

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Pending before the Court is Plaintiffs' motion for sanctions arising out of the judgment debtor examination. Docket No. 235. Defendants filed responses in opposition, and Plaintiffs filed a reply. Docket Nos. 236-39. The Court finds the motion properly resolved without oral argument. *See* Local Rule 78-2.

The Court takes very seriously the factual allegations made by Plaintiffs in their motion, including assertions of disobedience of court orders. The Court also takes very seriously its duty to order relief and sanctions that are based on sound legal authority, are supported by a sufficient evidentiary showing, and are within the powers authorized to magistrate judges. Those concerns are heightened when the relief sought is as significant as Plaintiffs seek here, including a finding of contempt and resulting orders of imprisonment. With that in mind, the Court expressly advised Plaintiffs that all requests for sanctions arising out of the judgment debtor examination had to be clearly enumerated and supported by “legal authority establishing that such relief may be properly granted.” Docket No. 232.

1 Because Plaintiffs' motion failed to provide a sufficient basis for the serious sanctions sought,
 2 the Court **DENIES** the motion without prejudice.

3 **I. BACKGROUND**

4 The parties and the assigned district judge are familiar with the long history of this litigation, and
 5 the undersigned will not repeat it at length here except as most relevant to the pending motion. On
 6 October 13, 2014, Plaintiffs filed a motion that Defendant/Judgment Debtor Koval Flamingo, LLC
 7 ("Koval") be subjected to a judgment debtor examination and be ordered to produce documents. Docket
 8 No. 226. Koval failed to oppose that motion, and the Court signed Plaintiffs' proposed order. *See*
 9 Docket Nos. 228-29. At the time set for the judgment debtor examination, Koval's counsel (Kenneth
 10 Morgan) appeared but a representative of Koval prepared to testify did not appear. *See* Docket No. 233.

11 The instant motion for sanctions was then filed by Plaintiffs. Docket No. 235.

12 **II. STANDARDS**

13 Rule 69(a)(2) allows parties to obtain discovery in aid of the judgment or execution as provided
 14 by the Federal Rules of Civil Procedure or by the procedure of the state where the court is located.¹
 15 When a party or a party's officer, director or managing agent fails to obey a discovery order, the Court
 16 may issue a variety of "just orders," including entry of case-dispositive sanctions, staying proceedings
 17 until obedience is obtained, and/or prohibiting the disobedient party from supporting or opposing certain
 18 designated claims or defenses. *See Rule 37(b)(2)(A).* In the context of post-judgment discovery, many
 19 of the specifically-enumerated sanctions in Rule 37(b)(2)(A) are no longer applicable or would be
 20 ineffective. *See, e.g., 1st Tech., LLC v. Rational Enterps. Ltda,* 2008 WL 4571057, *3 (D. Nev. July
 21 29, 2008), *adopted as modified,* 2008 WL 4974580 (D. Nev. Nov. 21, 2008). Even where judgment has
 22 already been entered, however, the Court may impose the effective sanction of finding that the failure
 23 to comply with a discovery order should be treated as contempt pursuant to Rule 37(b)(2)(A)(vii).

24 **A. Civil Contempt**

25 "Sanctions for civil contempt may be imposed to coerce obedience to a court order, or to
 26 compensate the party pursuing the contempt action for injuries resulting from the contemptuous

28 ¹ References to "Rules" refer to the "Federal Rules of Civil Procedure."

1 behavior, or both.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986).
 2 “Compensatory awards are limited to ‘actual losses sustained as a result of the contumacy.’” *Id.*
 3 (emphasis in original).

4 The civil contempt power of a magistrate judge regarding failure to abide by a discovery order
 5 is governed by 28 U.S.C. § 636(e). *See Aldridge v. Young*, 782 F. Supp. 1457, 1458 (D. Nev. 1991).
 6 Section 636(e) in its current form provides in relevant part that where:

7 the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts
 8 to a district judge and may serve or cause to be served, upon any person whose behavior
 9 is brought into question under this paragraph, an order requiring such person to appear
 before a district judge upon a day certain to show cause why that person should not be
 adjudged in contempt by reason of the facts so certified.

10 *See* 28 U.S.C. § 636(e)(6)(B)(iii) (2013).² The assigned district judge then hears the evidence to
 11 determine whether the conduct warrants punishment, and may impose contempt sanctions in the same
 12 manner and to the same extent as for a contempt committed before the district judge himself. *See id.*;
 13 *see also In re Kitterman*, 696 F. Supp. 1366, 1370 (D. Nev. 1988).

14 “A court has wide latitude in determining whether there has been contemptuous defiance of its
 15 order.” *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984). “In a civil contempt action, ‘[t]he moving
 16 party has the burden of showing by clear and convincing evidence that the contemnors violated a specific
 17 and definite order of the court. The burden then shifts to the contemnors to demonstrate why they were
 18 unable to comply.’” *F.T.C. v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004)

22 ² This Court does not make it a practice to correct attorneys regarding the proper title of the
 23 undersigned. As the very authority discussed by Plaintiffs’ counsel makes clear, however, *see* Docket No.
 24 239 at 5, the title of the undersigned’s position is “magistrate judge” and not “magistrate.” That change in
 25 title was made by Congress nearly 25 years ago. *See, e.g., Williams v. City of Mesa*, 2010 WL 2803880, *2
 26 n.1. (D. Ariz. July 15, 2010) (discussing relevant authority). “Thus, a magistrate judge may be appropriately
 called magistrate judge or judge, but not magistrate.” *Id.*

27 The Court also notes that Plaintiffs’ counsel at times refers to the “District Court judge,” *see, e.g.*,
 28 Docket No. 235 at 6, when the proper title is “District Judge,” *see, e.g.*, Docket No. 133 at 6 (signature line
 of Andrew P. Gordon, “United States District Judge”).

(quoting *F.T.C. v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999)).³ A finding of contempt is not appropriate where the contemnors have taken “all reasonable steps” to comply with the Court’s order. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992). A judgment debtor’s failure to comply with a post-judgment discovery order may be grounds for a contempt sanction. *See Baker v. Limber*, 647 F.2d 912, 919 (9th Cir. 1981) (“A judgment-debtor’s refusal to answer questions in a Rule 69 proceeding normally would justify a court’s exercise of its contempt power.”); *see also Alcalde v. NAC Real Estate Invs. & Assignments, Inc.*, 580 F. Supp. 2d 969, 971 (C.D. Cal. 2008) (certifying facts for contempt finding based on violation of court’s post-judgment discovery order).

10 B. Criminal Contempt

11 Whether a contempt is criminal or civil in nature depends on the substance of the proceeding and
 12 the character of the relief that will be afforded. *E.g., Hicks on behalf of Feoick v. Feoick*, 485 U.S. 624,
 13 631 (1988). While a civil contempt is remedial and for the benefit of the opposing party, criminal
 14 contempt is punitive and designed to vindicate the authority of the court. *See, e.g., Int’l Union, United*
 15 *Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28 (1994). “If the relief provided is a sentence of
 16 imprisonment, it is remedial if the defendant stands committed unless and until he performs the
 17 affirmative act required of the court’s order, and is punitive if the sentence is limited to imprisonment
 18 for a definite period.” *Feoick*, 485 U.S. at 631. A civil contempt sanction may become criminal over
 19 time. *See S.E.C. v. Elmas Trading Corp.*, 824 F.2d 732, 732-33 (9th Cir. 1987).

20 Criminal contempt is established when there is a clear and definite court order, the contemnor
 21 knows of the order, and the contemnor willfully disobeys the order. *United States v. Doe*, 125 F.3d 1249,
 22 1254 (9th Cir. 1997) (quoting *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980)).

23 A magistrate judge’s authority with respect to criminal contempt is primarily divided into two
 24 types. First, when contemptuous behavior occurs “in the magistrate judge’s presence so as to obstruct
 25 the administration of justice,” a magistrate judge has the power to invoke summary criminal contempt

27 ³ There need not be an intentional violation of the order to find a party in civil contempt. *See, e.g.,*
 28 *General Signal*, 787 F.2d at 1379.

1 sanctions. *See* 28 U.S.C. § 636(e)(2). Second, when contemptuous behavior occurs outside the presence
 2 of the magistrate judge, a magistrate judge may certify such facts to the district judge and order the
 3 contemnor to appear for a show cause hearing. 28 U.S.C. § 636(e)(6)(B)(ii).

4 Either form of criminal contempt invokes procedural protections for the contemnor. The precise
 5 procedural protections that apply depend on the context of each particular case. For example, different
 6 procedural protections are invoked depending on the severity of the criminal penalties at issue, and
 7 “serious criminal penalties” may only be imposed after “the contemnor [is] afforded the full protection
 8 of a criminal jury trial.” *F.J. Hanshaw Enters. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1138 (9th
 9 Cir. 2001). Moreover, the procedural protections vary depending on whether the contemptuous behavior
 10 occurred in the judge’s presence:

11 An individual charged with an indirect criminal contempt is entitled to the right to be
 12 advised of the charges; the right to a disinterested prosecutor; the right to assistance of
 13 counsel; a presumption of innocence; proof beyond a reasonable doubt; the privilege
 14 against self-incrimination; the right to cross-examine witnesses; the opportunity to
 15 present a defense and call witnesses; and the right to a jury trial if the fine or sentence
 16 imposed will be serious.

17 *Id.* at 1139 (internal citations omitted).⁴

18 C. Sanctions Against Non-Parties

19 Rule 37(b)(2)(A) provides that a “party or a party’s officer, director, or managing agent” may
 20 be sanctioned for disobeying an order to provide discovery, up to and including imposition of a contempt
 21 sanction. As the Ninth Circuit has recognized:

22 It is imperative that we hold these officers in contempt if we are to have respect for and
 23 obedience to our orders in such cases. Our order was intended to protect legal rights.
 24 Contempt proceedings are unnecessary when such rights are honored. Responsibility
 25 must reach those with the power to alter the prohibited conduct.

26 ⁴ Plaintiffs at times refer to state statutes regarding criminal contempt sanctions. *See, e.g.*, Docket
 27 No. 235 at 2. While Rule 69 allows post-judgment discovery as authorized by either the Federal Rules of
 28 Civil Procedure or by state law, *see* Rule 69(a)(2), it is unclear to the Court why the contempt powers of the
 undersigned would be governed by state law rather than by federal statute.

1 *N.L.R.B. v. Sequoia Dist. Council of Carpenters, AFL-CIO*, 568 F.2d 628, 634 (9th Cir. 1977). Quite
 2 simply, “[a]n order to a corporation binds those who are legally responsible for the conduct of its
 3 affairs.” *United States v. Laurins*, 857 F.2d 529, 535 (9th Cir. 1988).

4 “Generally, to be held liable in contempt, it is necessary that a non-party respondent must either
 5 abet the defendant or must be legally identified with him.” *Sequoia Dist. Council*, 568 F.2d at 633. “In
 6 order to hold a corporate officer in contempt, the movant must show that he or she had notice of the
 7 order and its contents.” *Ist Technology*, 2008 WL 4571057, at *7 (citing *Elec. Workers Pension Trust*
 8 *Fund of Local Union # 58, IBEW v. Gary’s Elec. Serv. Co.*, 340 F.3d 373, 380 (6th Cir. 2003)).⁵

9 III. ANALYSIS

10 In this instance, Plaintiffs request six forms of sanctions:

- 11 (1) that the undersigned certify facts to the assigned district judge for him to hold a show cause hearing as to why Koval’s post-trial motions and oppositions should not be stricken;
- 12 (2) that the undersigned certify facts to the assigned district judge for him to hold a show cause hearing as to why Bruce Seyburn should not be arrested and held in criminal contempt and imprisoned until he complies with the undersigned’s order setting the judgment debtor examination;
- 13 (3) that the *pro hac vice* order for Koval’s counsel, Kenneth Morgan, be revoked;
- 14 (4) that an order to show cause issue as to why Steven Gouletas and Bruce Seyburn not be held in criminal contempt and imprisoned for destroying documents in violation of a state court temporary restraining order;
- 15 (5) that an order to show cause be issued by the assigned district judge why the judgment against Koval should not be doubled; and
- 16 (6) that Plaintiffs be awarded attorneys’ fees and costs for bringing the motion for judgment debtor examination and preparing for the examination.

22 The Court will address each requested form of relief sought below in turn. Before the Court does so, however, it notes an overarching problem with Plaintiffs’ motion: Plaintiffs fail to provide any meaningful discussion showing that Koval violated a clear and definite court order. While that shortcoming may seem obvious to Plaintiffs, that analysis is the necessary first step in any contempt

27 ⁵ The Ninth Circuit has concluded that corporate officers may be found to have actual notice of an order’s terms by virtue of evidence showing their long-standing relation to the underlying controversy. See *Sequoia Dist. Council*, 568 F.2d at 634.

1 order, and the Court believes it important for Plaintiffs to discuss the standards and explain how they
 2 are met. Similarly, the factual assertions made in the brief are often done so in a disorganized manner
 3 and without citation to evidence.

4 A. Striking of Briefing

5 The pending motion seeks issuance of an order for Koval to show cause why its post-trial
 6 motions and other briefing should not be stricken. Courts have “broad equitable power to order
 7 appropriate relief in civil contempt proceedings.” *S.E.C. v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003).
 8 Nonetheless, in addressing violations of discovery orders, “courts are generally reluctant to impose novel
 9 sanctions of a sort not mentioned in [Rule 37(b)(2)].” *1st Technology*, 2008 WL 4571057, at *4 (citing
 10 Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE, § 2289). Magistrate Judge George W.
 11 Foley, Jr. faced a similar request in *1st Technology*, in which the movant sought an order prohibiting the
 12 disobedient party from presenting any arguments or filing any documents until it had complied with the
 13 discovery order. *Id.* Judge Foley rejected that request because the movant failed to explain how such
 14 a sanction was not overly-broad and how it fit with the disobedience at issue. *See id.* (“It is conceivable,
 15 however, that there are potential future matters that the Court would and should permit the [disobedient
 16 party] to address, notwithstanding their failure and refusal to comply with the discovery order”).
 17 Nonetheless, Judge Foley left open the possibility of prohibiting the disobedient party from making
 18 specific arguments or filings, especially when the failure to comply with the discovery order “is relevant
 19 to the type of relief being sought by [the disobedient party].” *Id.*

20 In this case, Plaintiffs have failed to explain why the factual circumstances presented render such
 21 a form of sanction appropriate, have failed to explain the specific arguments and filings at issue (and any
 22 relation they have to the conduct currently before the Court), and have failed to provide legal authority
 23 establishing that it is a proper sanction under the applicable rules.

24 B. Imprisonment of Bruce Seyburn

25 The pending motion seeks the issuance of an order for Bruce Seyburn to show cause why he
 26 should not be arrested and held in criminal contempt until he complies with the order setting the
 27 judgment debtor examination. *See, e.g.*, Docket No. 235 at 2. This request appears to be based on the
 28 assertion that the “business entity controlling KOVAL was controlled by Bruce Seyburn.” *Id.* at 8. It

1 appears that this sanction is sought for Bruce Seyburn not appearing at the judgment debtor examination
 2 to testify on behalf of Koval. *See* Docket No. 239 at 13.

3 As a threshold matter, Plaintiffs failed to address the standards discussed above for holding Mr.
 4 Seyburn in contempt as a non-party. *See* Section II.C. Second, while Plaintiffs refer to “criminal”
 5 contempt, it appears that the imprisonment that they seek may be civil in nature since the term of
 6 imprisonment may be ended through compliance. *See* Section II.B. Hence, Plaintiffs fail to explain
 7 clearly whether they are seeking criminal or civil contempt sanctions.

8 C. Pro Hac Vice Revocation

9 The pending motion seeks the revocation of the *pro hac vice* status of Koval’s attorney, Mr.
 10 Morgan. Plaintiffs contend that Mr. Morgan has engaged in misrepresentations, discovery violations,
 11 and other misconduct. *See* Docket No. 235 at 9. As an initial matter, Plaintiffs failed to clearly
 12 articulate each instance of misconduct and support their allegations with evidentiary support. Moreover,
 13 Plaintiffs failed to provide even the most basic standards that apply to a determination of whether an
 14 attorney’s *pro hac vice* status should be revoked. Plaintiff refers to *Chenin v. Encore*, but fails to
 15 provide a proper citation such that the Court could locate that case or clearly explain what standards are
 16 established by that case. *See* Docket No. 239 at 17.

17 D. Destruction of Documents

18 The pending motion seeks the initiation of contempt proceedings against Bruce Seyburn for
 19 destroying documents in violation of a restraining order.⁶ As currently presented, this request is not
 20 sufficiently developed for several reasons. First, Plaintiffs do not clearly identify the order that they
 21 contend was violated. Plaintiffs did not attach that order as an exhibit to the pending motion, nor did
 22 they provide a quotation of its relevant content. Second, it appears that the restraining order was issued
 23 by the state court in another case. *See* Docket No. 235 at 4 (referring to the “temporary restraining order
 24 issued by the State court”). Plaintiffs provide no legal authority or argument that this Court has the
 25 power to initiate contempt proceedings against individuals for their purported violation of a state court
 26

27 ⁶ Plaintiffs initially sought imprisonment for Steven Gouletas, as well, but withdrew that request in
 28 their reply brief. *See* Docket No. 239 at 16.

1 order.⁷ Third, the primary issue before the Court relates to the alleged failure to comply with this
 2 Court's judgment debtor examination order. While that order required, *inter alia*, the production of
 3 documents, it is not entirely clear why sanctions are being sought for alleged document destruction at
 4 an earlier time through the pending motion. *Cf.* Special Order No. 109, Section III.F.4 (separate motions
 5 must be filed when raising separate issues or requesting separate relief). Fourth, Plaintiffs failed to
 6 provide meaningful discussion (and evidence) regarding the role of Mr. Seyburn in the destruction of
 7 the evidence. *See* Section II.C. Fifth, Plaintiffs fail to explain clearly whether they are seeking criminal
 8 or civil contempt sanctions. *See* Section II.B.

9 E. Doubling the Judgment

10 The pending motion seeks issuance of an order to show cause why the amounts of the judgments
 11 against Koval should not be doubled pursuant to 18 U.S.C. § 3571(d). As an initial matter, Plaintiffs
 12 fail to explain how the cited statutory provision is applicable in instances such as that before the Court.
 13 Moreover, Plaintiffs fail to explain whether the sanction is meant to be compensatory, coercive, or
 14 punitive in nature, which impacts the Court's analysis of its appropriateness, the form in which the
 15 sanction is imposed (*e.g.*, payable to the court or to the party), and various procedural issues.

16 F. Attorneys' Fees and Costs

17 The pending motion seeks an award of Plaintiffs' attorneys' fees and costs. *See* Docket No. 235
 18 at 2. Plaintiffs fail to explain under what legal provision(s) they are seeking fees and costs.⁸ While

21 ⁷ The Court focuses herein on Plaintiffs' contention that a state court restraining order was violated
 22 because that is how Plaintiffs' motion is framed. Of course, the Court is not suggesting that parties only
 23 have a duty to preserve relevant evidence when an order has been issued that it do so. *Cf. Apple Inc. v.*
Samsung Elecs. Co., Ltd., 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012) (spoliation of evidence occurs when
 24 there is "destruction or material alteration of evidence or [] the failure to preserve property for another's use
 25 as evidence in pending or reasonably foreseeable litigation").

26 ⁸ Plaintiffs rely on comments made by the Court at the hearing at the judgment debtor examination
 27 in seeking costs and fees. *See, e.g.*, Docket No. 239 at 3, 4. As the Court clarified through its written order,
 28 however, Plaintiffs' motion was required to "specify all relief that Plaintiffs are seeking arising out of the
 scheduled judgment debtor examination, and must provide legal authority establishing that such relief may
 be properly granted." Docket No. 232.

1 Plaintiffs most likely are seeking the payment of their expenses pursuant to Rule 37(b)(2)(C), they have
2 not made that clear and have not addressed the relevant standards or considerations for such an award.

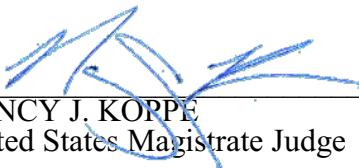
3 **IV. CONCLUSION**

4 Plaintiffs' motion raises serious allegations of misconduct. It also seeks the imposition of
5 significant sanctions, including imprisonment. Because the Court finds that the motion is not properly
6 supported as currently presented, it is hereby **DENIED** without prejudice.

7 The Court herein expresses no opinion as to whether sanctions are appropriate and, if so, what
8 sanctions should be imposed. To the extent a motion for sanctions is renewed, Plaintiffs should ensure
9 that it discusses the relevant standards, provides an evidentiary basis for its factual assertions, and
10 provides meaningful discussion explaining why each sanction is appropriate as to each person or entity
11 against whom sanctions are sought. Any such renewed motion shall be filed within 14 days of the
12 issuance of this order.

13 **IT IS SO ORDERED.**

14 DATED: February 20, 2015

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NANCY J. KORPE
United States Magistrate Judge